Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

JOSEPH OSLER BRICE, *et al.*,
Petitioners,

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Childhood Vaccine Injury Act of 1986, which Congress intended to create a benevolent compensation program that would make awards "quickly, easily, and with certainty and generosity," is subject to equitable tolling.

PARTIES TO THE PROCEEDINGS

The petitioners are Joseph Osler Brice, Laurajean Councill Brice, and their son Joseph Tilghman Brice. The respondent is Tommy G. Thompson, the Secretary of Health and Human Services.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE FEDERAL COURTS OF APPEALS HAVE APPLIED THIS COURT'S TWO LEADING DECISIONS INVOLVING EQUITABLE TOLLING IN SUBSTANTIALLY DIFFERENT AND CONFLICTING WAYS, AND CLARIFICATION IS NEEDED IN THIS IMPORTANT AREA	5
II. THE AVAILABILITY OF EQUITABLE TOLLING TO CLAIMS BROUGHT UNDER THE VACCINE ACT IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT WAS WRONGLY DECIDED BY THE FEDERAL CIRCUIT	9
CONCLUSION	17
APPENDIX A (Decision of the United States Court of Appeals for the Federal Circuit)	1a
APPENDIX B (Opinion of Judge Roger B. Andewelt)	24a
APPENDIX C (Order denying petition for rehearing en banc)	40a

TABLE OF AUTHORITIES

CASES

Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999)..... 9
Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998).....6, 7, 17
Brice v. Secretary of HHS, 240 F.3d 1367 (Fed. Cir. 2001)..... 6
Burnett v. New York Central Railroad Co., 380 U.S. 424 (1964)..... 16, 17
Flight Attendants Against UAL Offset v. Commissioner, 165 F.3d 572 (7th Cir. 1999)..... 7
Hansen v. United States, 248 F.3d 761 (8th Cir. 2001)..... 7
Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000).....7, 8, 14
Iavorski v. INS, 232 F.3d 124 (2d. Cir. 2000).....7, 8, 17
Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990).....4, 5, 11
Kamara v. INS, 149 F.3d 904 (8th Cir. 1998)..... 9
Lopez v. INS, 184 F.3d 1097 (9th Cir. 1999)..... 8
Lowry v. Secretary of HHS, 189 F.3d 1378 (Fed. Cir. 1999)..... 14
Perez v United States, 167 F.3d 913 (5th Cir. 1999)..... 7, 8
RHI Holdings v. United States, 142 F.3d 1459 (Fed. Cir. 1998)..... 6
Shalala v. Whitecotton, 514 U.S. 268 (1994) 11
Stone Container Corp. v. United States, 229 F.3d 1345 (Fed. Cir. 2000)..... 4, 6
United States v. Brockamp, 519 U.S. 347 (1997).....4, 6, 12, 16
United States v. Prescott, 221 F.3d 686 (4th Cir. 2000)..... 8

STATUTES

Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. 2244(d)..... 8

TABLE OF AUTHORITIES—Continued

	Page
Federal Tort Claims Act, 28 U.S.C. 2401(b)	8
National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 *et seq*	*passim*
42 U.S.C. 300aa-11(a)(2)(B)	13
42 U.S.C. 300aa-11(a)(5)(A)	13
42 U.S.C. 300aa-11(a)(8)	13
42 U.S.C. 300aa-11(c)	11
42 U.S.C. 300aa-12(d)(3)(A)(ii)	14
42 U.S.C. 300aa-12(d)(3)(C)	14
42 U.S.C. 300aa-16(a)(2)	2
MISCELLANEOUS	
H.R. Rep. No. 99-908, 99th Cong., 2d Sess. 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6287	2, 10
H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 3 (1989), reprinted in 1989 U.S.C.C.A.N. 1906	15
United States General Accounting Office, "Vaccine Injury Compensation: Program Challenged to Settle Claims Quickly and Easily" (GAO Dec. 1999)	15

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Joseph Osler Brice, Laurajean Councill Brice, and Joseph Tilghman Brice, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on February 23, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 240 F.3d 1367 (Fed. Cir. 2001) and is contained in Appendix A to this petition, at pgs. 1a-23a. The prior decision of Judge Roger B. Andewelt of the United States Court of Federal Claims is reported at 44 Fed. Cl. 673 (Fed. Cl. 1999) and is contained in Appendix B, at 24a-39a. The order denying the petition for rehearing en banc is reported at 2001 U.S. App. LEXIS 13324 (Fed. Cir. 2001) and is contained in Appendix C, at 40a-41a.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on February 23, 2001. A petition for rehearing en banc was timely filed and denied on May 31, 2001. This petition for writ of certiorari is filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. 300aa-16(a)(2), the section of the National Childhood Vaccine Injury Act of 1986 that specifies the time limit for filing petitions under the Act:

> "[N]o petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury."

STATEMENT OF THE CASE

1. Congress enacted the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act" or "Act"), 42 U.S.C. 300aa-1 *et seq.*, as a federal no-fault law authorizing compensation to be paid to persons who have suffered serious injury or death as a result of receiving one of the vaccines listed in the Act. Congress intended that the Act create a benevolent "compensation program under which awards can be made to vaccine-injured persons quickly, easily and with certainty and generosity." App. A at 3a, quoting H.R. Rep. No. 99-908, at 3, 99th Cong., 2d Sess. 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6344. The Act also specified that all petitions for compensation must be filed within 36 months of the onset of the vaccine-related injury. 42 U.S.C. 300aa-16(a)(2).[1]

---

[1] The Vaccine Act also contains a "grandfather" provision allowing petitions to be filed for injuries incurred prior to the effective date of

2. On December 19, 1995, Joseph Osler Brice and Laurajean Councill Brice, acting *pro se*, filed a petition for compensation under the Vaccine Act claiming that their son, Joseph Tilghman Brice ("Tilghman"), suffered a seizure disorder and other injuries resulting from measles-mumps-rubella ("MMR") vaccination administered to him on April 30, 1992. Prior to filing suit, the Brices initially consulted several doctors who told them that their son's reaction was not vaccine-related. It was not until March 30, 1995, that a doctor diagnosed Tilghman with a residual seizure disorder resulting from the MMR vaccine.

On March 27, 1996, the Special Master dismissed the Brices' petition for lack of jurisdiction because it was untimely. The Brices appealed, and Judge Roger B. Andewelt of the United States Court of Federal Claims ("Claims Court") reversed and remanded the case back to the Special Master, holding that the doctrine of equitable tolling does apply to cases brought under the Act. On remand, the Special Master held that equitable tolling was not appropriate under the specific facts of this case, and a second appeal was filed. Judge Andewelt remanded the case a second time for consideration of equitable tolling. The Special Master again determined that equitable tolling did not apply to this case. A third appeal was filed, and this time Judge Andewelt affirmed the Special Master's decision.

An appeal was then filed in the United States Court of Appeals for the Federal Circuit. The Federal Circuit is the only circuit authorized to review Vaccine Act cases.

3. A divided panel of the Court of Appeals affirmed the dismissal of the Brices' petition. The majority opinion

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the Act, and mandating that these petitions be filed by a date certain–February 1, 1991. *See* 42 U.S.C. 300aa-16(a)(1). Equitable tolling of this provision involving the so-called "pre-Act cases" is **not** an issue involved in this case.

concluded that equitable tolling can never apply to the Vaccine Act. In reaching this conclusion, the majority acknowledged that the two leading Supreme Court decisions involving equitable tolling "do not speak with perfect clarity" and create "uncertainty exactly as to when equitable tolling is permissible," App. A at 6a-7a (citing to that court's prior decision in *Stone Container Corp. v United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000).

The majority acknowledged that the presumption of equitable tolling enunciated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), does apply to cases brought pursuant to the Vaccine Act. App A at 10a-11a. However, the majority concluded that Congress intended to override this presumption in adopting the Vaccine Act. In reaching this conclusion, the majority applied the five factors set forth in *United States v. Brockamp* 519 U.S. 347 (1997). The majority found that only two of the five factors were present in the Vaccine Act. It found this sufficient to establish a complete bar to equitable tolling for cases brought under the Vaccine Act.

4. The dissenting opinion concluded that the majority's decision misread Congressional intent and was inconsistent with the principles set forth by this Court in *Irwin* and *Brockamp*:

> The panel majority, barring equitable tolling on any and all grounds, states that Congress intended to foreclose equitable tolling in Vaccine Act cases. However, the statute does not so provide, and the legislative record reflects no such intent. The Vaccine Act contains no basis for the majority's hypothesis that Congress imposed an absolute bar to any petition filed beyond the three-year statutory limitations period. . . .
>
> The panel majority's reliance on *Brockamp* as totally barring equitable tolling is unsupported, is contrary to

Irwin, and is contrary to the Court's overall treatment of the issue of limitations.

Dissenting op., App. A at 16a-18a (footnotes omitted).

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURTS OF APPEALS HAVE APPLIED THIS COURT'S TWO LEADING DECISIONS INVOLVING EQUITABLE TOLLING IN SUBSTANTIALLY DIFFERENT AND CONFLICTING WAYS, AND CLARIFICATION IS NEEDED IN THIS IMPORTANT AREA

There is an urgent need for this Court to clarify the law of equitable tolling, which has been applied in an inconsistent and contradictory manner by the federal courts of appeals. The Federal Circuit has indicated in several recent cases that there is a crucial need for further guidance from this Court in applying equitable tolling principles, and the decisions from the Federal Circuit and the other courts of appeals demonstrate clearly that this is so. The confusing principles in this area have resulted in inconsistent application of the equitable tolling doctrine and contradictory decisions by the courts of appeals. Further guidance and clarification are needed from this Court.

1. Since 1990, this Court has issued two decisions in an attempt to clarify the doctrine of equitable tolling. In *Irwin v. Dept. of Veterans Affairs,* 498 U.S. 89 (1990), this Court indicated that it had granted review out of concern that its prior practice of deciding equitable tolling cases "on an ad hoc basis" had resulted in "continuing unpredictability" in this area of law. 498 U.S. at 95. The Court added: "We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling to suits against the Government." *Id.* The Court in *Irwin* enunciated some general principles in this area, including the principle that once Congress has enacted a waiver of

sovereign immunity, the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96.

In 1997, this Court again revisited the equitable tolling issue in *United States v. Brockamp*, 519 U.S. 347 (1997). Seeking to provide further guidance in this area, the Court in *Brockamp* enunciated five factors that it would apply in determining whether Congress intended equitable tolling to apply to a provision of the Internal Revenue Code authorizing income tax refunds. The Court examined the statute's (1) detail, (2) technical language, (3) multiple iterations of the limitations period in procedural and substantive form, (4) explicit inclusion of exceptions, and (5) the underlying subject matter of the statute. 519 U.S. at 350-52.

2. This Court's decisions in *Irwin* and *Brockamp* have not resulted in the desired clarification of the law of equitable tolling, but appear to have had precisely the opposite effect. The Federal Circuit has indicated in several recent cases that: "The Supreme Court's decisions do not speak with great clarity on the subject of equitable tolling." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000); *Brice v. Secretary of HHS*, App. A at 6a. In *Stone Container Corp*, the Federal Circuit added that it had "previously struggled to reconcile *Irwin* and *Brockamp*," 229 F.3d at 1353-54, citing two of its prior decisions in *Bailey v. West*, 160 F.3d 1360, 1362-68 (Fed. Cir. 1998)(en banc), and *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998). The majority decision by the Federal Circuit in *Brice* reiterated that *Irwin* and *Brockamp* create "uncertainty as to when equitable tolling is permissible." App. A at 7a. Thus, rather than bringing clarity to the law of equitable tolling, this Court's decisions in *Irwin* and *Brockamp* appear to have had the opposite effect of creating confusion and uncertainty as to when equitable tolling is applicable.

3. This confusion is clearly reflected in the inconsistent and contradictory manner in which the courts of appeals have applied the principles enunciated in *Irwin* and *Brockamp*. Several courts of appeals have indicated that *Brockamp* was a very narrowly drafted decision that applied only to the specific section of the tax code involved in that case. The Seventh Circuit has refused to broaden the applicability of *Brockamp* to other sections of the tax code, stating that "*Brockamp* is not broadly written." *Flight Attendants Against UAL Offset v. Commissioner of Internal Revenue*, 165 F.3d 572, 577 (7th Cir. 1999). The Eighth Circuit has also viewed *Brockamp* as a narrow decision which applied to situations where the United States gave its consent to be sued for refunds of federal taxes. *Hansen v. United States*, 248 F.3d 761 (8th Cir. 2001). A similar narrow reading of *Brockamp*, limited to the specific section of the tax code involved in that case, was endorsed by the Fourth Circuit in *Harris v. Hutchinson*, 209 F.3d 325, 329 (4th Cir. 2000).

In contrast, three other circuits have read *Brockamp* much more broadly to establish five criteria that must be evaluated not just in the specific context of the tax statute involved in that case, but to be applied to all situations involving equitable tolling of all federal statutes. *Iavorski v. U.S. Immigration and Naturalization Service*, 232 F.3d 124, 130 (2d Cir. 2000)(Immigration and Nationality Act); *Perez v. United States*, 167 F.3d 913 (5th Cir. 1999)(Federal Tort Claims Act); *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998)(Board of Veterans Appeals). These courts of appeals have read the applicability of *Brockamp* and the five factors set forth in that case in a much more expansive manner than did the Fourth, Seventh and Eighth Circuits.

4. There is also a substantial dispute in the courts of appeals as to how many of the five *Brockcamp* factors must be present for the court to conclude that Congress did or did not intend that a statue could be equitably tolled. The Federal

Circuit held in this case that the Vaccine Act could not be equitably tolled, even thought only two of the five factors set forth in *Brockcamp* were present. *See,* App. A at 11a:

> It is true, as the Brices argue and the government concedes, that three of these factors are not present here: the Act is not particularly technical, it does not include multiple iterations of the limitations period, and the administrative complexity of the Vaccine Program does not compare to that of the income tax.

By contrast, the Fifth Circuit recently held that the Federal Tort Claims Act's statute of limitations, 28 U.S.C. 2401(b), was subject to equitable tolling when only two of these same factors were not present—the statute was not particularly technical, but involved "a garden variety limitations provision," and allowing equitable tolling would not create administrative problems comparable to that of the income tax law. *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999). Similarly, the Fourth Circuit recently held that the statutory limitation period contained in the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. 2244(d), was subject to equitable tolling because of the important policy interests involved, despite the fact that the statute contained several other explicit exceptions to the statute's strict limitations periods. *Harris v. Hutchinson*, 209 F.3d 325, 329 (4th Cir. 2000).

The difficulty that the courts have had in applying equitable tolling principles is also evidenced by the substantial split in the circuits on the question on whether the limitations period for filing motions to reopen deportation proceedings can be equitably tolled. The Second and Ninth Circuits have held that this provision can be equitably tolled. *Iavorski v. INS*, 232 F.3d 124, 130 (2d Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999). The Eighth and Eleventh Circuits have held that this provision cannot be equitably

tolled. *Kamara v. INS*, 149 F.3d 904, 906 (8th Cir. 1998); *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999).

5. It is important for the Court to accept review in this case to provide guidance to the courts of appeals on how broadly or narrowly to apply the factors set forth in *Brockamp*, and to assist the courts of appeals in reconciling *Brockamp* and *Irwin*. The Federal Circuit has correctly noted that these two decisions "do not speak with perfect clarity" and create "uncertainty exactly as to when equitable tolling is permissible." App A at 6a-7a. This Court should clear up the confusion and inconsistent approaches that the courts of appeals have adopted. The Court should now provide more definitive guidance in determining when the doctrine of equitable tolling applies to federal statutes.

II. THE AVAILABILITY OF EQUITABLE TOLLING TO CLAIMS BROUGHT UNDER THE VACCINE ACT IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT WAS WRONGLY DECIDED BY THE FEDERAL CIRCUIT

The Federal Circuit's majority opinion has adopted a rigid and inflexible rule that the Vaccine Act can never be equitably tolled under any circumstance. That decision impacts a large number of petitions that have been, and continue to be, brought under the Act. The decision is also demonstrably inconsistent with the Congressional intent in adopting this generous, benevolent compensation program for children injured by vaccinations. Because the Federal Circuit is the only court of appeals with authority to review Vaccine Act cases, review by this Court is necessary to correct the Federal Circuit's serious misreading of the Act and the legislative intent behind it.

1. Congress enacted the National Childhood Vaccine Injury Act in 1986 as a federal no-fault law authorizing compensation to be paid to persons who have suffered serious

injury or death as a result of receiving one of the vaccines listed in the Act. Congress intended that the Act create a benevolent "compensation program under which awards can be made to vaccine-injured persons quickly, easily and with certainty and generosity." App. A at 13a, quoting H.R. Rep. No. 99-908, 99th Cong., 2d Sess. 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6344. The Act also specified that all petitions for compensation must be filed within 36 months of the onset of the vaccine-related injury. 42 U.S.C. 300aa-16(a)(2).

2. The Vaccine Act affects virtually every child and family in the United States, since all states mandate that children receive childhood vaccinations. However, there is a substantial problem caused by the 36-month limit to file a petition for compensation, in that many parents are not even aware of the existence of the Act, or not aware that their child suffered a serious injury that was related to a vaccination. The facts of this case are a stark illustration of this problem. Petitioners consulted several doctors about their son's seizure disorder, and were told that their son's problems were in no way related to the vaccination he received. It was not until March 30, 1995, two years and eleven months after their son had suffered the onset of his seizure disorder, that a doctor first diagnosed Tilghman as suffering from a residual seizure disorder caused by his receipt of an MMR vaccination. Many other parents have also faced similar problems in meeting the 36-month deadline. There are approximately 30 reported decisions involving equitable tolling and the Vaccine Act, and this number does not include other late-filed petitions for compensation which have been dismissed without explanation of the reasons for dismissal, or other cases where petitions were not even filed because the 36-month period had expired. Every year, according to statistics compiled by the Department of Health and Human Services, petitions are filed that appear to exceed the 36-month limitations period.

3. This Court has previously granted review in one case involving the Vaccine Act. In *Shalala v. Whitecotton*, 514 U.S. 268 (1994), this Court addressed the question of whether a vaccination caused the "onset" of an injury within the meaning of 42 U.S.C. 300aa-11(c), when the injury had already manifested itself prior to the administration of the vaccination. That issue involved a relatively narrow question that effects only a small minority of cases brought under the Act. By contrast, the equitable tolling issue involved in this case is a much broader question that affects a much larger category of cases that have been and continue to be brought under the Act.

4. The decision below that equitable tolling is not applicable to Vaccine Act cases is clearly wrong. The majority opinion misapplied the principles enunciated in *Irwin* and *Brockamp*, and did not give sufficient weight to the presumption set forth in *Irwin* that equitable tolling does apply to statutory schemes like the Vaccine Act. Moreover, in concluding that Congress intended to override this presumption when it adopted the Vaccine Act, the majority misapplied the five factors set forth in *Brockamp*. The majority concluded that Congress intended to override the presumption because two of the five factors supported a bar to equitable tolling. However, neither of these two factors supports such a bar, and even if they did provide some support for a bar, the presence of only these two of five factors would not be sufficient to overcome the presumption of equitable tolling set forth in *Irwin* and re-affirmed in *Brockamp*.

In *Irwin*, this Court held that once Congress has enacted a waiver of sovereign immunity, the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. This presumption, which the panel majority acknowledged is applicable to the Vaccine

Act, requires the court to determine whether "there [is] *good reason* to believe that Congress *did not want* the equitable tolling doctrine to apply." App. A at 11a (emphasis added), quoting from *Brockamp*, 519 U.S. at 350.

In *Brockamp*, this Court relied upon five criteria in determining whether Congress wanted equitable tolling to apply to a provision of the Internal Revenue Code: (1) the statute's detail, (2) its technical language, (3) its multiple iterations of the limitations period in procedural and substantive form, (4) its explicit inclusion of exceptions, and (5) its underlying subject matter of the statute. 519 U.S. at 350-52.

There was no dispute by respondent or by the panel majority that three of these five factors were not present with respect to the Vaccine Act, App. A at 11a:

> It is true, as the Brices argue and the government concedes, that three of these factors are not present here: the Act is not particularly technical, it does not include multiple iterations of the limitations period, and the administrative complexity of the Vaccine Program does not compare to that of the income tax.

However, the panel majority concluded that the two remaining factors were present—the Act includes an exception to the limitations period when a petition is improperly filed in the wrong court, and the Act contains a number of apparently strict deadlines for the resolution of petitions once they are filed under the Vaccine Act. The majority concluded that the presence of these two factors was sufficient to overcome the presumption that equitable tolling does apply in post-Act cases.

5. The panel majority is wrong for two reasons. First, neither of the two factors the majority relies upon truly supports the conclusion that Congress intended to totally foreclose equitable tolling in all Vaccine Act cases. Second,

even assuming arguendo that these two factors do provide some support for the majority's decision, the presence of these two factors would not be sufficient to overcome the presumption that equitable tolling does apply.

The first factor relied upon by the panel majority is that the Act includes a specific exception from the limitations period for a petition improperly filed in state or federal court. Such a petition must be dismissed from the state or federal court, but "the date such dismissed action was filed shall, for purposes of the limitations of actions [*i.e.*, the 36-month period] prescribed by [section 16 of the Act], be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action." 42 U.S.C. 300aa-11(a)(2)(B).

However, the fact that Congress provided for one way to extend the limitations period in the Vaccine Act does not support the conclusion that Congress intended to negate all others. In fact, there are two other analogous provisions of the Vaccine Act, which the panel majority ignores. One provision allows a person who had a civil action pending in state or federal court on the date that the Vaccine Act took effect in 1988 to "have such action dismissed without prejudice or costs and file a petition under [the Vaccine Act] . . . at any time within 2 years after the effective date of this subpart or before judgement, whichever occurs first. . . ." *Id.*, § 300aa-11(a)(5)(A).

Another provision of the Vaccine Act, not cited by the panel majority, allows a person who had an appeal or a petition for rehearing in a civil action in state or federal court pending on the effective date of the Act to discontinue the civil case and file a petition under the Act. *Id.*, § 300aa-11(a)(8).

What all of these provisions have in common was the Congressional intent to allow and encourage vaccine-injury claims to be brought and litigated in the United States Court

of Federal Claims under the provisions of the Vaccine Act, rather than as civil actions against manufacturers or physicians in state or other federal courts. These statutory provisions in the Vaccine Act reflect the congressional intent of "encouraging participation in the program and keeping potential plaintiffs in the system," as the Court recognized in *Lowry v. Secretary of HHS*, 189 F.3d 1378, 1381 (Fed. Cir. 1999). These provisions in no way reflect a congressional intent to prohibit equitable tolling relief in any and all circumstances.

6. The second factor that the panel majority relied upon in concluding that Congress did not intend to allow equitable tolling was that the Act's "limitations period is part of a detailed statutory scheme which includes other strict deadlines." App. A at 12a. The panel majority cites provisions of the Act which require Special Masters to issue decisions within 240 days of the filing of a petition, § 300aa-12(d)(3)(A)(ii), and allow special masters to suspend proceedings for no more than a total of 150 days, § 300aa-12(d)(3)(c).

The panel majority's reliance on these statutory provisions is misplaced for several reasons. First, these provisions were principally intended to assist *petitioners* in securing an expeditious resolution of their cases *once the cases were filed. See, e.g.*, H.R. Rep. No. 99-908, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6344. The Congressional purposes of promoting the expeditious and generous compensation of injured persons under the Vaccine Act are actually undercut, and not furthered, by the panel majority's absolute ban on equitable tolling in Vaccine Act cases, because it would encourage litigation in other fora. Moreover, the Congressional desire to have Vaccine Act cases proceed expeditiously in no way reflects an intent to absolutely foreclose relief to petitioners who acted reasonably but were late in filing their petitions under the Act.

Another reason why the panel majority's reliance on these strict statutory guidelines is misplaced is that these statutory guidelines have been largely irrelevant to the actual operation of the program from the very beginning, as Congress has well known. In a report issued in 1989, one year after the Act took effect, Congress noted that the Act was not functioning as the expeditious and streamlined manner that Congress had intended. *See* H.R. Rep. No. 101-247, at 509 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2235. This is also documented in a report issued by the United States General Accounting Office to the U.S. Senate Committee on Health, Education, Labor and Pensions, "Vaccine Injury Compensation: Program Challenged to Settle Claims Quickly and Easily" (GAO Dec. 1999). This GAO Report concluded that "while [the Vaccine Injury Compensation Program] was expected to provide compensation for vaccine-related injuries quickly and easily, these expectations have not often been met." *Id.* at p. 19. In practice, the GAO found that from the beginning of the program only 14 percent of the petitioners received judgment within one year. Thirty-nine percent received judgment within two to five years. Further, in 18 percent of the cases, petitioners waited five years or more for their judgments. *Id.* at p. 8.

The GAO Report cited two interrelated reasons which were central to these long delays:

> The first was a large influx of claims filed a few years after the program began. The second was that as more funding became available to defend claims, HHS increasingly challenged the ones it regarded as not clearly meeting the statutory criteria.

Thus, it is apparent that from the very beginning the strict processing deadlines that the Act attempted to impose were largely irrelevant. Congress had tried but had not succeeded in creating a system that insured that petitioners would have their claims resolved "quickly and easily," in the words of the

GAO Report. This attempt by Congress in no way supports the panel majority's conclusion that Congress intended to absolutely foreclose relief to petitioners who acted reasonably but were late is filing their petitions under the Vaccine Act.

Neither reason relied upon by the panel majority supports its conclusion that Congress intended to foreclose equitable tolling. In addition, even assuming arguendo that these two factors did provide some support for the majority's conclusion, the presence of only these two out of five factors would not be sufficient to overcome *Irwin*'s presumption that equitable tolling does apply. These two factors do not establish "good reason to believe that Congress did not want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350.

7. The panel majority's decision is also inconsistent with a number of recent decisions from this and other courts that have held that equitable tolling is applicable to "benevolent" statutory schemes similar to the Vaccine Act. The leading case from this Court is *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1964), which involved the Federal Employers Liability Act. This Court concluded that equitable tolling was available to a worker injured in the course of his employment, stating:

> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act. Such an examination leads us to conclude that it effectuates the basic congressional purposes in enacting *this humane and remedial Act*, as well as those policies embodied in the Act's limitation provision, to hold that [equitable tolling is available in appropriate situations].

380 U.S. at 427-48 (emphasis added) (footnote omitted).

The Second Circuit has recently reached a similar conclusion with respect to the immigration and nationality laws, *Iavorski v. INS*, 232 F.3d 124, 129 (2d Cir. 2000), as has the Fourth Circuit with respect to the habeas corpus statute, *Harris v. Hutchinson*, 209 F. 3d 325 (4th Cir. 2000). *See also*, *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998)(en banc), where the Court held that the Veterans' Benefit Act was subject to equitable tolling.

The Congressional intent behind all of these statutes, as well as the Vaccine Act, was to provide a "benevolent" statutory scheme. This purpose is important in determining whether there is "good reason" to believe that Congress intended to foreclose equitable tolling under these statutes. In *Burnett v. New York Central Railroad Co.* and these other cases, the courts recognized that the very nature of these benevolent statutory schemes undercut any assertion that Congress intended to absolutely bar equitable tolling in any and all circumstances. The panel majority's decision ignored this important principle in concluding that equitable tolling can never apply to the Vaccine Act's compensation program for children injured by vaccines.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-5144

JOSEPH OSLER BRICE and LAURAJEAN COUNCILL BRICE,
On behalf of their son, JOSEPH TILGHMAN BRICE,
Petitioners-Appellants,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

DECIDED: FEBRUARY 23, 2001

Before NEWMAN, CLEVENGER, and DYK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK. Dissenting Opinion filed by *Circuit Judge* NEWMAN.

DYK, *Circuit Judge*.

DECISION

In *Weddel v. Secretary of Health and Human Services*, 100 F.3d 929 (Fed. Cir. 1996), this court held that equitable tolling of the limitations period was not available for claims arising under section 16(a)(1) of the National Childhood Vaccine Injury Act of 1986 ("Act"), 42 U.S.C. §§ 300aa-1 *et seq.*, which applies to vaccines administered prior to the effective date of the Act ("pre-Act cases"). This case presents the question whether equitable tolling is available for claims arising under section 16(a)(2) of the Act, which applies to

vaccines administered after the effective date of the Act ("post-Act cases"). We hold that equitable tolling is not available in such cases.

I

Congress established the National Vaccine Program in 1986 "to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines." 42 U.S.C. § 300aa-1. As part of this program, Congress established the National Vaccine Injury Compensation Program ("Program") to provide compensation for vaccine-related injuries and deaths. *See* 42 U.S.C. § 300aa-10.

The Act creates a federal no-fault system for compensating injuries causally connected to vaccines. The Act establishes a claims procedure involving the United States Court of Federal Claims and special masters, *see* 42 U.S.C. § 300aa-12, and it provides two separate mechanisms through which a party seeking compensation may establish that an injury was caused by a vaccine. First, a causal connection between vaccine and injury is rebuttably presumed if the administration of the vaccine and the particular injury are related in time as specified in the Vaccine Injury Table of 42 U.S.C. § 300aa-14. *See* 42 U.S.C. §§ 300aa-11(c)(1)(C)(i), 300aa-13(a)(1). If the injury is not listed in the Table, or if its symptoms are not evident within the time frame specified by the Table, an injured claimant faces a more demanding evidentiary burden. Such a claimant must prove that the vaccine was the actual cause of the injury. *See* 42 U.S.C. § 300aa-11(c)(1)(C)(ii). As this court has noted, "[g]iven the vagaries of human illnesses, particularly in young children, that is not always an easy burden to carry." *Munn v. of Dept of Health and Human Servs.*, 970 F.2d 863, 865 (Fed. Cir. 1992).

The Act does not entirely preclude traditional tort remedies. However, before an individual may bring an action seeking more than $1,000 in damages in state or federal court, he must first file a petition under the Program. *See* 42 U.S.C. § 300aa11(a)(2)(A). The filing of a petition under the Program stays the running of state statutes of limitations. *See* 42 U.S.C. § 300aa-16(c). The Act then gives a petitioner the choice to accept the judgment obtained under the Program and surrender his tort rights or to reject that judgment and pursue a civil action for damages. *See* 42 U.S.C. § 300aa-21(a). We need not decide in this case whether a petitioner who fails to file a timely petition under the Program may still pursue traditional tort remedies.

In establishing the Vaccine Program, two concerns motivated Congress. First, it was concerned that tort liability would make production of vaccines economically unattractive, potentially discouraging vaccine manufacturers from remaining in the market. *See* H.R. Rep. No. 99-908, at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6347-48. Congress thus included in the Act certain federal modifications of state tort law, including limits on punitive damage awards and a rule that a vaccine manufacturer shall not be held liable in post-Act cases if an injury resulted from unavoidable side effects provided the vaccine was properly prepared and accompanied by proper directions and warnings. *See* 42 U.S.C. §§ 300aa-22(b)(1), 300aa-23(d). Second, Congress was concerned that the traditional tort system was inadequate to compensate many who were injured by vaccines. Congress noted that the opportunities of those injured by vaccines to seek redress under the traditional tort system were "limited, time-consuming, [and] expensive," and that for the injured, "mounting expenses must be met." H.R. Rep. No. 99-908, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6347. Congress intended awards under the Act to be made "quickly, easily, and with certainty and generosity." H.R. Rep. No. 99-908, at 3, *reprinted* in 1986 U.S.C.C.A.N.

at 6344. Congress also emphasized the importance of speed and the quick resolution of petitions: "The entire proceeding—from date of filing through Special Master proceedings and court review—is to take place as expeditiously as possible . . . . [M]uch of the equity in limiting compensation and limiting other remedies arises from the speed and reliability with which the petitioner can expect judgment; without such quick and certain conclusion of proceedings, the compensation system would work an injustice upon the petitioner." H.R. Rep. No. 99-908, at 17, *reprinted in* 1986 U.S.C.C.A.N. at 6358.

II

Joseph Tilghman Brice ("Tilghman") and his parents, Dr. Laurajean Councill Brice and Dr. Joseph Osler Brice, seek compensation under the Act for injuries that Tilghman allegedly suffered from a Measles, Mumps, and Rubella ("MMR") vaccination he received on April 30, 1992. Nine days later, on May 9, 1992, Tilghman suffered a seizure, which petitioners contend constituted the first manifestation of a vaccine related injury. Section 16(a)(2) of the Act specifies that for a post-Act vaccine such as Tilghman's MMR vaccine, "if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." 42 U.S.C. §§ 300aa-16(a)(2). Thus, absent any tolling, the limitations period for the Brices' petition expired on May 9, 1995, over seven months before they filed their petition on December 19, 1995.[1]

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[1] The Brices initially argued before the special master that Tilghman suffered a significant aggravation of his condition in September 1994, when the Brices discovered that Tilghman's condition was worse than it

Following his vaccination, Tilghman experienced delays in meeting his developmental milestones. On March 30, 1995, Dr. Eileen Vining, a neurologist, diagnosed Tilghman with a residual seizure disorder. Dr. Vining told Tilghman's mother that Tilghman had suffered an MMR reaction and suggested that the Brices file a claim under the Vaccine Program. At this point, the Brices had approximately five weeks left before the end of the limitations period. The Brices sought information on the Vaccine Program. They also began compiling Tilghman's medical records, which they say they believed were required to file their petition. However, Tilghman's mother did not send out requests for Tilghman's medical records until June 19, 1995. The Brices also unsuccessfully sought counsel to assist them in filing their petition, at least in some instances after the statutory deadline had passed. The Brices filed their Vaccine Act petition pro se on December 19, 1995.

On March 27, 1996, a special master dismissed the Brices' petition for lack of jurisdiction due to its untimely filing. The special master did not address the possibility of equitable tolling. The Brices petitioned for review, and on September 6, 1996, the Court of Federal Claims held that equitable tolling applies to post-Act cases and remanded to the special master to determine whether equitable tolling was appropriate under the circumstances. *See Brice v. Dep't of Health and Human Servs.*, 36 Fed. Cl. 474, 481-82 (1996). On November 1,

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initially seemed. The Court of Federal Claims held that "where, as here, a petitioner alleges that a vaccine caused an injury and that later there was a significant aggravation of that same injury, the petitioner must file a petition within 36 months of the first symptom or manifestation of the onset of the injury." *Brice v. Dep't of Health and Human Servs.*, 36 Fed. Cl. 474, 476 (1996). The Brices now apparently agree that the statute of limitations began to run on May 9, 1992, and in any case we agree with the analysis of the Court of Federal Claims, i.e., that the statute began to run with the manifestation of Tilghman's first symptoms on May 9, 1992.

1996, the special master held an evidentiary hearing on the circumstances of Tilghman's vaccination, seizure, and the actions of the Brices in the years following the seizure. On November 26, 1996, the special master concluded that the Brices had "failed to exercise reasonable diligence in discovering essential information bearing on their son's claim" and therefore that equitable tolling was not appropriate. On February 13, 1998, the Court of Federal Claims again remanded to the special master, this time to make findings regarding whether the Brices exercised due diligence after they learned on March 30, 1995 that Tilghman suffered from residual seizure disorder. On remand, the special master concluded that between March 1995 and December 19, 1995, the Brices exercised "no diligence in this case, much less due diligence." On August 11, 1999, the Court of Federal Claims affirmed the special master's decision, holding that the special master's determination that the Brices had not acted with due diligence was not arbitrary or capricious. *See Brice v. Dep't of Health and Human Servs.*, 44 Fed. Cl. 673, 678 (1999). The Brices then appealed to this court.

III

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3). Whether equitable tolling is permitted under the Vaccine Act is a question of law which we review de novo. *See Weddel*, 100 F.3d at 931. We note that a "statute of limitations is a condition on the waiver of sovereign immunity by the United States," and courts should be "careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000) (quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (internal quotation omitted)).

As we have recently noted, the Supreme Court's decisions do not speak with perfect clarity on the subject of equitable

tolling against the government. *See Stone Container Corp.*, 229 F.3d at 1352. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), which involved an equitable tolling claim against the government under Title VII, the Supreme Court adopted "a more general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 498 U.S. at 95. The Court held that once Congress had enacted a waiver of sovereign immunity, the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court explained that this new rule was "a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* at 95.

The Supreme Court's subsequent decision in *United States v. Brockamp*, 519 U.S. 347 (1997), demonstrates that it is possible for the government to rebut *Irwin*'s presumption of equitable tolling and also creates uncertainty exactly as to when equitable tolling is permissible. In *Brockamp*, taxpayers asserted that the two-year limitations period of § 6511 of the Internal Revenue Code was subject to equitable tolling. The Court's opinion raised the possibility that equitable tolling might not apply to claims against the government unless those claims were similar to claims against private parties. Nevertheless, the Court was "willing to assume, favorably to the taxpayers but only for argument's sake, that a tax refund suit and a private party suit for restitution are sufficiently similar to warrant asking *Irwin*'s negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350.

The Court in *Brockamp* then rejected equitable tolling under § 6511 based on the Court's determination that the relevant limitations statute manifested congressional intent to preclude tolling. Several factors influenced its analysis. First, rather than using the simple language of ordinary

limitations periods, the tax statute set forth its limitations in "a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* Second, the statute also restated its limitations period "several times in several different ways." *Id.* at 351. Third, the statute set forth certain explicit exceptions to its time limits, and these exceptions did not include equitable tolling. *See id.* Fourth, the Court pointed to the underlying subject matter of tax collection as inconsistent with the case-specific exceptions of equitable tolling. It noted that the IRS processes over 200 million returns and issues 90 million refunds each year, and that equitable tolling could therefore create significant administrative difficulties. *See id. at* 352. *See also United States v. Beggerly*, 524 U.S. 38, 48-49 (1998).

This court has been required to reconcile *Irwin* and *Brockamp*, on at least two occasions. In *Bailey v. West*, 160 F.3d 1360, 1362-1368 (Fed. Cir. 1998) (en banc), this court allowed equitable tolling of time limits for appealing Board of Veterans' Appeals decision to the Court of Veterans Appeals. That case represented a relatively easy analysis under *Irwin* and *Brockamp*, because none of the factors present in *Brockamp* was present in that case. *See Bailey*,160 F.3d at 1365. In contrast, in *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998), this court rejected equitable tolling in a tax refund case under the limitations period specified in 26 U.S.C. § 6532(a). However, the analysis of the limitations period in *RHI Holdings* was not particularly difficult either, as the statute of limitations in *RHI Holdings* was similar to that in *Brockamp*. The limitations period in *RHI Holdings* was set forth in a detailed, technical manner; the statute reiterated its limitations period three times; the statute included a specific exception for extending the limitations period; and the underlying subject matter concerned tax collection. *See RHI Holdings*, 142 F.3d at 1462. Until now, this court has not been required to

harmonize *Irwin* and *Brockamp* when some but not all of the factors identified in *Brockamp* were present.

IV

Before turning to the analysis of equitable tolling in this case, we note that the equitable tolling issue for post-Act cases is not resolved by *Weddel v. Secretary of Health and Human Services*, 100 F.3d 929 (Fed. Cir. 1996). In that case, this court held that equitable tolling of the limitations period was not available for claims-in pre-Act cases. However, for such cases, the Act provided a statute of repose, and equitable tolling is not applicable to statutes of repose. *See e.q., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). As this court noted in *Weddel*, a "statute of repose cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action." *Weddel*, 100 F.3d at 931. In particular, for pre-Act cases, the Act provided that "no petition may be filed for compensation under the Program for such injury or death after the expiration of 24 months after the effective date of this title." National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, § 2116(a)(1), 16.0 Stat. 3755, 3769 (1986). The rule that equitable tolling is not available for statutes of repose is consistent with the principles of *Irwin* and *Brockamp*: by establishing an outer date for bringing an action, a statute of repose manifests a congressional intent not to allow tolling. *See Weddel*, 100 F.3d at 931.

V

We now reach the question whether equitable tolling is available in post-Act cases.[2] The Act states: "a vaccine set

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[2] We reject the Brices' argument that because the government did not file a cross-appeal, this court cannot address whether equitable tolling is available in post-Act cases. We of course may affirm a trial court's order on any ground showing that the trial court's judgment was correct. *See Brown v. Allen*, 344 U.S. 443, 459 (1953)

forth in the Vaccine Injury Table which is administered after the effective date of this subpart, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." 42 U.S.C. § 300aa-16(a)(2).

As an initial matter, the government asserts that under *Brockamp* the rebuttable presumption of the availability of equitable tolling only applies if the federal cause of action is sufficiently similar to a private cause of action. The government argues that the Act creates a unique alternative to a traditional civil action and is thus unlike a private cause of action. It notes that the Act has a nonstandard evidentiary burden, that cases are tried through informal proceedings, that awards are limited with respect to pain and suffering and death benefits, that punitive damages are forbidden, and that judgments under the Act do not have the usual preclusive effects.

The reference in *Brockamp* to the suit against the government being "sufficiently similar" to a suit against a private party must be understood against the backdrop of *Irwin*, in which the Supreme Court presumed that the doctrine of equitable tolling "applicable to private suits," that is, suits against private parties, applied to suits "against the Government." *Irwin*, 498 U.S. at 95-96. If the suit against the government bears no similarity to a private quit, there is no basis for the presumption that Congress intended private equitable tolling rules to apply. Thus, for example, there is no reason to assume that a federal deadline for filing suit to challenge a generally applicable government regulatory requirement should be governed by equitable tolling principles developed in private litigation. But the rule of "similarity" generally should not apply in the context of

monetary claims against the government to bar equitable tolling. The distinctions set forth by the government between a Vaccine Act claim and a traditional tort action are not sufficient, in the words of *Brockamp* to avoid "asking *Irwin*'s negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp* 519 U.S. at 350. In substance, a claim under the Vaccine Act is similar to a traditional tort claim in the sense that it seeks monetary recovery from an injury that traditionally was redressed by tort law. The Vaccine Program's procedural and remedial distinctions from the traditional tort system do not change this fundamental fact.

However, there is good reason to find that Congress did not want the equitable tolling doctrine to apply in post-Act cases. In *Brockamp*, the Supreme Court relied upon five criteria in determining that the Congress did not want to apply equitable tolling to a provision of the Internal Revenue Code: the statute's detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter. *See Brock* 519 U.S. at 350-52. It is true, as the Brices argue and the government concedes, that three of these factors are not present here: the Act is not particularly technical, it does not include multiple iterations of the limitations period, and the administrative complexity of the Vaccine Program does not compare to that of the income tax. Nevertheless, we think that the remaining two factors are decisive.

First, the Act includes a specific exception from the limitations period for a petition improperly filed in state or federal court. Such a petition must be dismissed from the state or federal court, but "the date such dismissed action was filed shall, for purposes of the limitations of actions [i.e., the 36-month period] prescribed by [section 16 of the Act], be considered the date the petition was filed if the petition was

filed within one year of the date of the dismissal of the civil action." 42 U.S.C. § 300aa 11(a)(2)(B). When an Act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress.

Second, the limitations period is part of a detailed statutory scheme which includes other strict deadlines. Special masters are required to issue decisions within 240 days of the filing of a petition. *See* 42 U.S.C. § 300aa-12(d)(3)(A)(ii). Special masters may suspend proceedings for no more than a total of 150 days. *See* 42 U.S.C. § 300aa-12(d)(3)(C). In this connection, we note that the legislative history of the Act emphasizes the importance of quick resolution of claims. For example, Congress noted that "much of the equity in limiting compensation and limiting other remedies arises from the speed and reliability with which the petitioner can expect judgment." H.R. Rep. No. 99-908, at 17, *reprinted in* 1986 U.S.C.C.A.N. at 6358. To allow equitable tolling would conflict with these principles. While the doctrine of equitable tolling is designed to prevent harsh and unjust results, the difficulty with the doctrine is that it invites prolonged and wasteful collateral litigation concerning the running of the statute of limitations. This case is a quintessential example. After its initial dismissal by the special master, it was appealed to the Court of Federal Claims, was remanded to the special master, was appealed again to the Court of Federal Claims, was remanded again to the special master, was affirmed by the Court of Federal Claims, and was finally appealed here. It has now been over five years since the Brices' untimely filing of their petition. The government has informed us that other petitioners have sought to rely on equitable tolling in over thirty separate cases before the Court of Federal Claims. Lengthy collateral litigation is directly inconsistent with Congress's objective in the Vaccine Act to settle claims quickly and easily.

In addition, we note that the statute of limitations here begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at that time that the vaccine had caused an injury. It would be quite odd for Congress to allow a limitations period to run in cases in which a petitioner has no reason to know that a vaccine recipient has suffered an injury, but to provide for equitable tolling when a petitioner is aware that a vaccine has caused an injury but has delayed in filing suit.

In support of their argument for equitable tolling, the Brices emphasize that Congress intended for claims under the Act to be settled "quickly, easily, and with certainty and generosity." H.R. Rep. No. 99-908, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6344 (emphasis added). They also note that in allowing equitable tolling under the Veterans' Benefit Act, this court relied upon that act's "uniquely benevolent statutory framework," *Bailey v. West,* 160 F.3d 1360, 1369 (Fed. Cir. 1998), and they argue that the Vaccine Act also has a benevolent framework. This court, however, has already rejected the notion that the Act's purposes mandate the allowance of equitable tolling. In *Weddel*, we held that enforcement of a statutory cut-off date "provides claimants with certainty and in no way reduces the generosity of the program or speed with which the claims are adjudicated." *Weddel*, 100 F.3d at 932. Indeed, as we have noted above, allowing equitable tolling may actually interfere with quick resolution of Vaccine Act claims.[3]

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[3] We note that of the cases relied upon by the dissent, only *Iavorski v. Immigration and Naturalization Service*, 232 F.3d 124 (2nd Cir. 2000), was issued after *Brockamp*. Moreover, the deportation statute and regulatory framework at issue in *Iavorski* had none of the criteria identified by the Supreme Court in Brockamp as manifesting congressional intent to disallow equitable tolling. The *Iavorski* court found no indication in the "text, structure, legislative history, and purpose" of the statute at issue that Congress intended to restrict equitable tolling. *Iavorski*, 232 F.3d at 130.

We are told by parties that Congress may be asked to consider an extension of the statute of limitations for post-Act cases because parents of injured children are often not aware of the remedies available under the Act. It is not our role to opine on whether such legislation is desirable or undesirable. That is a proper decision for Congress to make. We determine only that equitable tolling in inconsistent with the existing statutory scheme.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims is affirmed.

COSTS

No costs.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-5144

JOSEPH OSLER BRICE and LAURAJEAN COUNCILL BRICE,
On behalf of their son, JOSEPH TILGHMAN BRICE,
Petitioners-Appellants,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

NEWMAN, *Circuit Judge,* dissenting.

The panel majority today holds that the National Childhood Vaccine Injury Act never permits equitable tolling of the period for filing a claim, whether the claim arose before the statutory enactment or afterward, no matter how worthy the petitioner or how compelling the petition. That is neither a necessary interpretation of the Vaccine Act, nor a tolerable one.

Tolling of a period of limitations awards no undeserved benefit; it simply opens the door to a petitioner upon whom the door should not be shut. It is a rare event, for most petitions are timely and courts are not sympathetic to delay. But courts are not precluded from evaluating the reason for the delay or from providing equitable relief when justice demands. As the Court stated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1973), "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." Why then would this court bar itself from the power and authority to do so?

The judicial prerogative, indeed our obligation, is to provide access to equitable tolling when the circumstances warrant. From my colleagues' ruling that this choice is not available in Vaccine Act cases, I must, respectfully, dissent.

The panel majority, barring equitable tolling on any and all grounds, states that Congress intended to foreclose equitable tolling in Vaccine Act cases. However, the statute does not so provide, and the legislative record reflects no such intent. The Vaccine Act contains no basis for the majority's hypothesis that Congress imposed an absolute and irremediable bar to any petition filed beyond the three-year statutory limitations period. Indeed, the Vaccine Act itself extends the period of limitations for cases erroneously filed in the district court instead of under the Vaccine Act; this congressional action to relieve a specific foreseeable problem does not establish congressional intent to prohibit relief for every other tardy filing. The absence from the Vaccine Act of explicit authorization for equitable tolling is not unusual, and does not defeat the courts' equitable power. *See American Pipe* 414 U.S. at 558 (recognizing judicial power to toll periods of limitation).

In justifying its decision to bar the possibility of equitable tolling, the panel majority complains that the Supreme Court has "creat[ed] uncertainty exactly as to when equitable tolling is permissible," citing *United States v. Brockamp*, 519 U.S. 347 (1997), as conflicting with *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In *Irwin* the Court confirmed that equitable toiling is as available in suits against the government as it is between private parties, observing that a rebuttable presumption of the availability of equitable tolling exists in suits against the government when Congress has not otherwise provided. 498 U.S. at 95. *Brockamp*, in turn, was a tax case wherein the Court carefully explained the specificity of its ruling that tax refund applications must meet the statutory filing deadline or be forfeited. These rulings illustrate the judicial obligation, as the Court explained in

Burnett v. New York Central Railroad Co., 380 U.S. 424 (1964), to examine "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427.

As elaborated in *Irwin*, the time limit in an ordinary statute of limitations is generally assumed to be subject to equitable tolling. 498 U.S. at 95-96. In *Brockamp* the Court took pains to explain why that tax refund provision was an exception to the general rule, the Court citing the "unusually emphatic form" of the statutory period. The Court referred to the ninety million tax refunds a year and the explicit detail and interaction of "limitations in both procedural and substantive forms," 519 U.S. at 350, as showing congressional intent to impose a strict filing deadline in tax refund cases. The Court observed that "[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." 519 U.S. at 352.

In contrast, in *Burnett* the Court was concerned with a "humane and remedial Act," the Federal Employers Liability Act, wherein the Court concluded that equitable tolling is available to a worker injured in the course of his employment. 380 U.S. at 427. Similary, the Vaccine Act is a case-specific system of individualized equities, meeting the criteria discussed in *Brockamp* as subject to equitable tolling. At oral argument the government agreed that the *Brockamp* factors differ from those of the Vaccine Act: unlike *Brockamp* the Act is not particularly emphatic about limitations; unlike *Brockamp* the Act does not state the filing deadline in a highly detailed technical manner; unlike *Brockamp* the Act does not reiterate the limitations period several times; and unlike *Brockamp* there would not be serious administrative problems in dealing with requests for tolling. Instead the government argued simply that since the Vaccine Act requires filing a claim with HHS as a prerequisite to civil litigation, there is a statutory emphasis on speed and diligence. The panel majority's reliance on *Brockamp* as

totally barring equitable tolling is unsupported, is contrary to *Irwin*, and is contrary to the Court's overall treatment of the issue of limitations. Indeed in another recent case on equitable tolling, *United States v. Beggedy*, 524 U.S. 38, 48-49 (1998), the Court referred to the "generous" twelve-year period of limitations in the statute there at issue, including that it ran from when the complainant "knew or should have known" of the existence of the cause of action. In the Brices' case, it is undisputed that the infant was not diagnosed with vaccine injury until only a few months before the end of the statutory period.

Equitable tolling does not decide the substantive merits of the claim. Nor does the availability of tolling ensure that it will be granted in a particular case. When granted, it simply permits the claimant to present the claim. Statutes of limitations are designed to provide fairness to defendants who might otherwise be presented with stale claims after evidence is lost and memories faded. *See Burnett*, 380 U.S. at 428. The government has not alleged any such problem with permitting the Brices' claim to go forward. Indeed, the *Burnett* Court remarked that the interest of justice may outweigh the purpose of protecting defendants from tardy claims. *Id.*

Extensive precedent illustrates the application of these principles. *See, e.g., Iavorski v. Immigration & Naturalization Service*, 232 F.3d 124, 129 (2d Cir. 2000) (nothing in the text, structure, legislative history, or purpose of the deportation statute leads to the conclusion that Congress intended to bar access to tolling); *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir.1996) (equitable tolling is appropriate when delay prohibits the plaintiff from obtaining information essential to bringing suit); *Equal Employment Opportunity Comm'n v. Kentucky State Police Dept*, 80 F.3d 1086, 1095-96 (6th Cir.1996) (tolling available to petitioners who did not know of retirement rights); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir.1986) (purpose of the

statute, notice to the defendant, and the plaintiffs diligence determine the availability of equitable tolling). With the Court's reaffirmation in *Irwin*, *Brockamp* and *Beggerly* that equitable tolling remains available in claims against the government unless inconsistent with the purpose of the statute, there is no weight of support for the majority's ruling that equitable tolling is never available in Vaccine Act cases.

The majority offers the theory that a total bar to tolling in the Vaccine Act achieves the Act's purpose of quickly resolving claims and avoiding "prolonged and wasteful collateral litigation." To the contrary—a total bar defeats the Act's purpose to provide a non-adversarial and equitable governmental response to vaccine-related injury. Barring the possibility of tolling simply bars the possibility of relief to an injured infant, thus defeating the foundation of the Vaccine Act.

The ruling that equitable tolling can never be invoked in Vaccine Act cases is directly contrary to the holding in *Irwin* that equitable tolling is as available against the government as it would be in private litigation of the cause. The just solution to the rare situation[1] of delay beyond the statutory period of the Vaccine Act is not to deny all remedy in all situations; the solution is to view each such situation with the sympathy, wisdom, and rigor appropriate to the particular case. I therefore must dissent from the majority's complete bar to access to equitable tolling in Vaccine Act cases.

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[1] The panel majority cites a total of thirty Vaccine Act cases discussing equitable tolling since the inception of the Vaccine Act in 1986. Government counsel said there were "a few" cases a year. The majority apparently views this as an unreasonable burden. It would appear, however, that thirty requests for tolling since 1986 places the burden of injustice not upon the administrator of the Act but on the injured infants who will now be barred from raising the equitable issue.

II

The Court of Federal Claims did not preclude tolling, as does the panel majority, but held that the Brices did not exercise adequate diligence to warrant tolling of the three-year limitations period. However, the Brices presented a far stronger case of diligence than is acknowledged in the majority opinion. The record includes the following:

On May 9, 1992, nine days after infant Tilghman received a mumps-measles-rubella (MMR) vaccination on April 30, 1992, Mrs. Brice took Tilghman to the hospital, where he was diagnosed as in epileptic seizure. Mrs. Brice told the doctors that she believed he was suffering from a reaction to the vaccine. She testified that she was told that "she was using poor medical judgment and that she was only making a wild guess as to the cause of the seizure." On dismissal from the hospital she was told that he appeared to be normal.

Tilghman continued to experience seizures, and the Brices noticed that he slept for long periods. Their pediatrician, Dr. Rawitt, told the Brices that it was "normal because Tilghman was growing." In October 1994 the Brices observed that Tilghman made "funny mouth movements" after which he would sleep or rest for prolonged periods of time. The condition remained undiagnosed and the Brices took him to a pediatric neurologist, Dr. Blum, whose diagnosis was pediatric migraines after an encephalopathy caused by the MMR vaccine. Dr. Blum referred the Brices to another specialist, Dr. Vining, a renowned pediatric neurologist at Johns Hopkins. On March 30, 1995 Dr. Vining diagnosed Tilghman as suffering from residual seizure disorder with brain damage, resulting from the MMR vaccine. This was three years minus five weeks after the first seizure was observed on May 9, 1992.

Dr. Vining told the Brices about the Vaccine Act program of the Department of Health and Human Services. The Brices promptly contacted HHS. The Brices state that they

spoke with several staff people and left five different messages on the automated messaging system. They state that they received no response to their inquiries for five weeks, that HHS personnel had little or no knowledge of the vaccine program or how to file a claim, and that they were given confusing and sometimes contradictory information with respect to the requirements for filing. In mid-June 1995 the Brices received information including the HHS Guidelines for filing a petition for compensation. The Guidelines state that complete medical records must be provided with the filing:

> The petition *must* be accompanied by *all* medical related records potentially relevant to the issue of whether petitioner is entitled to an award. [Emphases in Guidelines.]

The Guidelines further stress the importance of providing complete medical documentation when the petition is filed:

> (4) Petitions not accompanied by all the documents required by statute and the Vaccine Rules, or an affidavit explaining why any missing required documents are unavailable, will not be filed by the clerk.

On June 19, 1995, promptly following receipt of the Guidelines from HHS, Mrs. Brice requested copies of Tilghman's medical records from all of his treating physicians. The Brices reported the length of time it took to obtain the records. They averred:

> We could not obtain the needed medical records any faster. One set of records had been taken off site, microfilmed, shipped to Texas and misfiled in a warehouse. The pediatrician that Tilghman saw subsequent to his May 9, 1992 hospitalization refused to give us our child's records. We tried to think of a way to circumvent the problem by having a friend, who is a physician, request Tilghman's records. This was the

> record submitted in the petition. It was not the treating doctor's records but a compilation of every other doctor's records who had treated our son. (Note, to date this record still has not been obtained even after being requested by Robert T. Murphy, U.S. Department of Justice). We truly anguished over the lack of this record.

The Brices also started immediately to comply with the Guidelines' suggestion that they needed an attorney. Indeed, the Guideline says that the petition must be signed by an attorney who is a member of the bar of the Court of Federal Claims. The Brices' search for counsel qualified to handle their case included contacting a family member who was an attorney and seeking assistance from the president of the Maryland State Bar Association and the past president of the Maryland Bar. One of the five attorneys with whom the Brices consulted informed the Brices that the statute of limitations had run and that she could not "in good conscience" file a claim on their behalf. The four other lawyers recommended filing a civil suit, but would not or could not help with a Vaccine Act petition, some mentioning the limitations problem. While attempting to retain counsel, the Brices continued to compile Tilghman's medical records, encountering delays and non-cooperation as they reported. The Brices eventually filed a Vaccine Act claim, *pro se*, on December 19, 1995. This was almost nine months after Dr. Vining's confirmation of Dr. Blum's diagnosis and notification of the HHS program, and seven months after the limitations period had run.

The Special Master held that "there is no diligence in this case, much less due diligence." The Court of Federal Claims affirmed. Although my colleagues on this panel endorse this ruling, it can not be reconciled with the evidence and the principles of equity. The parents were resourceful and persistent, coping with an ill and retarded infant while finding their way through the arcana of a complex statute. They were

unable to obtain legal help, and encountered non-cooperation or delay by some of the treating physicians and hospitals. The HHS instruction, that medical records *must* be complete or their absence supported by affidavit, was unequivocal. Although the panel majority rules that the Brices should have ignored these instructions and filed sooner with incomplete records, the question is whether the Brices acted with reasonable prudence and diligence in light of the circumstances.

The Vaccine Act measures the limitations period from "the date of the first symptom or manifestation of onset or of the significant aggravation of such [vaccine-related] injury." 42 U.S.C. §300aa-16(a)(2). For the infant Tilghman his vaccine-related injury was not diagnosed or accepted by the physicians who initially treated him, although his mother offered them the theory that there was a vaccine relationship. Almost three years elapsed before his injury was diagnosed and its cause established. Although it is conceded that the first seizure occurred a few days after administration of the MMR vaccine, thus starting the running of the period of limitations, late diagnosis of causation is relevant to equitable tolling. The misdiagnoses and absence of critical information that left the Brices uninformed until almost the end of the statutory period are factors to be considered. The record shows that the Brices acted reasonably when their son was eventually diagnosed and they were told of the Vaccine Act. When viewed objectively and with humanity, and taking note of the generosity of administration required in the Vaccine Act itself, equitable tolling is surely warranted in this case.

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed September 6, 1996]

No. 95-835V

JOSEPH TILGHMAN BRICE, LAURAJEAN COUNCILL BRICE,
and JOSEPH OSLER BRICE,
Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
Respondent.

Joseph Tilghman Brice, *Laurajean Councill Brice*, and *Joseph Osler Brice*, Pasadena, Maryland, *pro se*.

Robert T. Murphy, with whom were *Frank W. Hunger*, Assistant Attorney General, *Helene M. Goldberg*, Director, *John Lodge Euler*, Deputy Director, and *Gerard W. Fisher*, Assistant Director, Washington, D.C., for respondent.

OPINION

ANDEWELT, Judge.

I.

In this vaccine action, petitioners, Joseph Tilghman Brice (Tilghman) and his parents, Laurajean Councill Brice and Joseph Osler Brice, seek compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to 34 (the Vaccine Act), for injuries Tilghman allegedly suffered as a result of a Measles, Mumps, and Rubella (MMR) vaccination administered on April 30, 1992. Petitioners contend that Tilghman suffers as a residual seizure

disorder and brain damage which have unpaired his speech and behavior patterns. On May 9, 1992, nine days after he received the MMR vaccination, Tilghman suffered seizures and was hospitalized. According to his parents, Tilghman's early development was generally within the normal range and it was not until September 1994, when Tilghman began pre-school, that his parents became aware of the possibility of permanent injuries. In March 1995, Tilghman was diagnosed for the first time as suffering from a residual seizure disorder and brain damage. Thereafter, petitioners sought to secure an attorney to represent them in this court but after numerous unsuccessful attempts, ultimately filed the instant petition *pro se* on December 19, 1995, approximately nine months after the diagnosis of a residual seizure disorder and brain damage and approximately three years and seven months after Tilghman first suffered seizures on May 9, 1992. The special master assigned to review the petition dismissed the petition as barred by the statute of limitations set forth in Section 16(a)(2) of the Vaccine Act. This action is before the court on petitioners' motion for review of the special master's decision. For the reasons set forth below, this court remands this action for further consideration by the special master.

II.

A petitioner can prove that a vaccine caused an injury for which compensation is available under the Vaccine Act in either of two ways. The petitioner can prove by a preponderance of the evidence that the vaccine in fact caused the injury, *i.e.*, causation-in-fact (Section 11(c)(1)(C)(ii)) or, in the alternative, can secure a presumption that the vaccine caused the injury by demonstrating that the vaccine recipient suffers from one of the injuries specified in the Vaccine Injury Table (Section 14(a)) and that "the first symptom or manifestation of the onset or of the significant aggravation of [the injury) occurred within the time period after vaccine administration set forth in the Vaccine Injury Table" (Section 11(c)(1)(C)(i)).

Although the instant petition is not absolutely clear, petitioners apparently argue that they can establish causation-in-fact and, alternatively, that they are entitled to a presumption under the Vaccine Injury Table. As to a presumption under the Vaccine Injury Table, petitioners allege that Tilghman suffers from two listed injuries, a residual seizure disorder and encephalopathy, and that Tilghman experienced the first symptom or manifestation of the onset of these injuries when he experienced seizures on May 9, 1992, which is within the 15-day post-MMR vaccine administration time period set forth in the Vaccine Injury Table.

III.

The statute of limitations, which applies to the two alternative methods for demonstrating entitlement to compensation, is set forth in Section 16(a)(2) as follows:

> In the case of—
>
> a vaccine set forth in the Vaccine Injury Table which is administered after the effective date of this subpart, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the [Vaccine Act] for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury[.]

In dismissing the petition as barred by the statute of limitations, the special master reasoned that the first symptom or manifestation of the onset of Tilghman's injuries occurred when Tilghman first experienced seizures on May 9, 1992, and that the petition, filed 43 months later, therefore was filed beyond the statutory 36-month period. Petitioners argued, in effect, that the 36-month statutory period should not run from May 9, 1992, because at that time, Tilghman's development was generally within normal ranges and petitioners reasonably could not have known that Tilghman suffered from

encephalopathy or a residual seizure disorder until years later when Tilghman began do exhibit signs of abnormal beehvior. The special master, citing an unpublished opinion in *Melendez v. Secretary, HHS*, No. 94-103V (Ct. Fed. Cl. Jan. 6, 1995), rejected this argument on the ground that the statute of limitations in the Vaccine Act begins to run upon the first symptom or manifestation of the onset of the injury and is not tolled until the time the petitioner discovers that the vaccine caused the injury.

Petitioners also argued that Tilghman suffered significant aggravation of his condition when he commenced school in September 1994 or when he was latter diagnosed as suffering from a residual seizure disorder and brain damage. The special master rejected this contention on the ground that, as used in the Vaccine Act, "significant aggravation" refers to the aggravation of an injury that existed before the date of the vaccination in question and that petitioners, rather than contending that Tilghman suffered from a residual seizure disorder and encephalopathy prior to the MMR vaccination, allege that the MMR vaccine itself caused Tilghman's injuries. The special master reasoned: "Without a condition before the vaccination, the vaccination could not significantly aggravate anything."

For the reasons set forth in *Childs v. Secretary, HHS*, 33 Fed. Cl. 556, 559 (1995), the special master is correct that "significant aggravation," as used in the Vaccine Act, refers to a condition that pre-dated the administration of the vaccine. *See also* 42 U.S.C. § 300aa-33(4) (defining "significant aggravation" as a "change for the worse in a preexisting condition"). Hence, where, as here, a petitioner alleges that a vaccine caused an injury and that later there was a significant aggravation of that same injury, the petitioner must file a petition within 36 months of the first symptom or manifestation of the onset of the injury and does not have the option to file within 36 months after the alleged significant aggravation.

V.

More complex issues arise from the special master's handling of petitioners' argument that the statute of limitations should not run from May 9, 1992, because petitioners did not know, and reasonably could not have known, at that time that Tilghman suffered from encephalopathy or a residual seizure disorder. To evaluate petitioners' argument, the court must distinguish between two concepts involving the running of the statute of limitations: accrual and equitable tolling. Accrual describes the beginning of the running of the statute of limitations and the accrual date is the date on which the statute of limitations commences to run. Equitable tolling potentially comes into play after a claim accrues and potentially can prevent the expiration of a statute of limitations that has begun to run. *Catawba Indian Tribe v. United States*, 982 F.2d 1564, (Fed. Cir.), *cert. denied*, 509 U.S. 904 (1993). In *Catawba*, the Court of Appeals for the Federal Circuit explained: "Even if there is no express tolling provision applicable, courts may when circumstances require invoke the concept of tolling as an equitable matter." *Id.* at 1571.

Catawba involved a federal statute that was the result of successful negotiations among the Catawba Indian Tribe (the Tribe), the State of South Carolina, and the federal government. The Tribe had agreed to the terms included in the statute based on assurances from federal officials that the statute would not adversely affect the Tribe's claim to its ancestral lands. As ultimately interpreted by the Supreme Court and applied by the Court of Appeals for the Fourth Circuit, however, the statute had the effect of extinguishing the Tribe's tights to certain ancestral lands. Four years after the Supreme Court issued its decision interpreting the statute and 28 years after the statute's enactment, the Tribe brought suit against the United States in this court. The government moved to dismiss that suit as barred by the applicable six-year

statute of limitations. The Tribe responded that, especially in view of the assurances by federal officials that the statute would not adversely affect the Tribe's ancestral lands, the Tribe did not know it had been injured until the Supreme Court interpreted the statute and that the suit should be deemed timely because it was brought within six years of that Supreme Court decision.

The *Catawba* a court addressed both accrual and equitable tolling of the statute of limitations. The court appears to have categorized the argument that the Tribe did not know it had suffered any injury from enactment of the statute as relevant to the application of the doctrine of equitable tolling rather than accrual. As to accrual, the court explained: "It is hornbook law that a claim does not accrue until all events necessary to fix the liability of the defendant have occurred—when 'the plaintiff has a legal right to maintain his or her action.'" *Id.* at 1570 (quoting Calvin W. Corman, *Limitation of Actions* § 6.1, at 374 (1991)); *see also Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 240, 368 F.2d 847, 851 (1966). The court, explaining that knowledge of injury was not a prerequisite for accrual, stated:

> While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.

982 F.2d at 1570 (emphasis in original). The court went on to take the position, however, that knowledge of injury was relevant to the issue of whether, after accrual, the statute of limitations should be equitably tolled. The court stated:

> As noted, a traditional ground for equitable tolling of a statute of limitations is based on the avoidance of

> penalizing a plaintiff simply because under the circumstances plaintiff did not and could not have known of the upon which the claim is based.

Id. at 1572 (emphasis in original) (citing Corman, *Limitation of Actions*, § 11.1).

VI.

Turning to the issue of accrual of the statute of limitations in Section 16(a)(2), the terms of the Vaccine Act demonstrate that Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act. First, a particular symptom or manifestation, such as a seizure, often can result from a variety of different conditions. Hence, a petitioner typically will recognize that a particular symptom constitutes the first symptom or manifestation of the onset of a certain injury only with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury. By commencing the running of the limitations period on the date the first symptom or manifestation of the onset occurs, Congress chose to start the running of the statute before many petitioners would be able to identify, with reasonable certainty, the name of the injury.

Sections 11(c)(1)(D) and 14(b)(2) provide further support for the conclusion that Congress intended the statute of limitations to commence to run prior to the time a petitioner has knowledge of the nature of the injury. Section 11(c)(1)(D)(i) provides that in order to obtain compensation under the Vaccine Act, a petition must contain an affidavit and supporting documentation demonstrating that the person who suffered the injury "suffered the residual effects or complications of such . . . injury . . . for more than 6 months after the administration of the vaccine and incurred unreimbursable expenses due in whole or in part to such . . . injury . . . in an amount greater than $1,000." Because an injury

compensable under the Vaccine Act does not arise until after the vaccine recipient has suffered the residual effects of the injury for at least six months, and because the first symptom or manifestation of the onset of such injury typically would occur prior to the individual having suffered the residual effects for six months, in enacting Section 11(c)(1)(D)(i), Congress necessarily understood that the statute of limitations would commence to run prior to the time a petitioner has knowledge that the individual suffered an injury compensable under the Vaccine Act.

The same conclusion flows from the definition of residual seizure disorder contained in Section 14(b)(2), which provides:

> (2) A petitioner may be considered to have suffered a residual seizure disorder if the petitioner did not suffer a seizure or convulsion unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit before the first seizure or convulsion after the administration of the vaccine involved and if—
>
> > (A) in the case of a measles, mumps, or rubella vaccine or any combination of such vaccines, the first seizure or convulsion occurred within 15 days after administration of the vaccine and 2 or more seizures or convulsions occurred within 1 year after the administration of the vaccine which were unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit . . . .

Under this definition, a petitioner very possibly would not know that the vaccine recipient suffered from a qualifying residual seizure disorder until up to as much as one year after the occurrence of the first symptom or manifestation of the onset of that injury, *i.e.*, the first seizure or convulsion. Yet the wording of Section 16(a)(2) commences the running of the 36-month limitations period upon the occurrence of the first seizure.

For the above stated reasons, Congress intended the 36-month statute of limitations in Section 16(a)(2) to commence to run upon the first symptom or manifestation of the onset of the injury and not to be delayed until the time the petitioner has actual knowledge that the vaccine recipient suffered an injury compensable under the Vaccine Act. Because the statute of limitations commenced to run more than 36 months prior to petitioners filing the instant petition, the petition would be barred unless the running of the limitations period was tolled after it commenced to run.

VII.

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Supreme Court concluded that there is a rebuttable presumption that equitable tolling applies in suits against the federal government. In *Catawba*, the Federal Circuit explained: "[A] traditional ground for equitable tolling of a statute of limitations is based on the avoidance of penalizing a plaintiff simply because under the circumstances plaintiff did not and could not have known of the *facts* upon which the claim is based." 982 F.2d at 1572 (emphasis in original). Herein, petitioners contend that until years after the first symptom or manifestation of the onset of Tilghman's injuries, they did not know, and reasonably could not have known, the crucial fact that Tilghman suffered from either a residual seizure disorder or encephalopathy. Hence, assuming petitioners can prove what they contend, by combining the reasoning in *Irwin* and *Catawba* a presumption arises that the statute of limitations in Section 16(a)(2) was equitably tolled for at least some period of time.

In applying *Irwin* and *Catawba*, the court must first assess whether there is anything in the Vaccine Act that rebuts the presumption that equitable tolling applies to petitions, such as the instant petition, that involve vaccines administered after

the effective date of the Vaccine Act.[1] The wording of Section 16(a)(2) appears to establish a definite date for expiration of the statute of limitations—"36 months after the occurrence of the first symptom or manifestation of onset." But courts have interpreted other statutes with an analogous level of definiteness as not inconsistent with the presumption that equitable tolling applies. For example, the statute of limitations in *Irwin* required filing—"within thirty days of receipt of final action taken by the Equal Employment Opportunity Commission." Similarly, in *Catawba*, where the Federal Circuit reasoned that equitable tolling potentially could apply, the claim was filed more than six years after the claim accrued and the statute provided: "Every claim . . . shall be barred unless the petition . . . is filed within six years after the claim first accrues."[2] Hence, the wording of Section

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[1] Injuries resulting from vaccines administered *before* the effective date of the Vaccine Act are covered in Section 16(a)(1) which requires that a petition be filed within 28 months after October 1, 1988, *i.e.*, by February 1, 1991. In *Smith v Secretary, HHS*, 26 Cl. Ct. 116, 119, *aff'd*, 983 F.2d 1088 (Fed. Cir. 1992). the court concluded that equitable tolling does not apply to Section 16(a)(1) because February 1, 1991, was intended to serve as a cutoff date for all covered petitions. *See also Iacono v. Office of Personnel Management*, 974 F.2d 1326 (Fed. Cir. 1992) (the Spouse Equity Act is not subject to equitable tolling because it required all claims to be filed by May 7, 1989, which therefore served as a cutoff date). There is no similar single cutoff date for post Vaccine Act petitions and hence, the reasoning of *Smith* would not apply when interpreting Section 16(a)(2).

[2] In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); the Supreme Court held that equitable tolling does not apply to the statute there under consideration, but the Court's analysis therein does not aid defendant here. In *Gilbertson* the statute sets forth two limitations—an action must be filed within one year of discovery of the facts constituting the violation and within three years after such violation. The Court held that equitable tolling is "fundamentally inconsistent" with the one- and three-year structure. The one-year period indicates that Congress considered and addressed delays in a plaintiff discovering the facts that underlie the violation and the Court interpreted the three-year

16(a)(2) is not itself enough to rebut the presumption that equitable tolling applies.

The statutory wording that lends most support for the argument that Congress intended equitable tolling not to apply to post-Vaccine Act petitions is the wording of Section 16(a)(2), discussed above, which starts the running of the statute upon the first symptom or manifestation of the onset of the injury even though the petitioner reasonably would not have known at that time that the vaccine recipient suffered an injury compensable under the Vaccine Act. Arguably, if Congress considered knowledge of the injury to be significant when applying the statute, Congress would not have commenced the running of the statute before the time a petitioner has such knowledge. But accrual and equitable tolling are distinct concepts and the fact that Congress did not intend accrual to be delayed until the time a petitioner has knowledge of the injury does not mean that Congress also intended equitable tolling not to apply. First, equitable tolling differs from accrual in that equitable tolling is an equitable doctrine. Hence, when Congress chooses not to negate the presumption that equitable tolling applies, Congress permits a delay in the running of the statute of limitations only in those situations where a court determines that the equities of the particular case demand such a delay. Courts have no similar flexibility when Congress delays accrual until a specified prerequisite occurs.

Second, delaying accrual pending the occurrence of a certain event and allowing equitable tolling pending the occurrence of that same event have different ramifications with respect to the required timing for the filing of a petition.

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period as serving only to impose an "outside limit" on that discovery. In the instant case, unlike in *Gilbertson*, there is only one statutory period and that period, as defined in the statute, is more closely analogous to the periods in *Irwin* and *Carawba* and other statutes where equitable tolling is available.

For example, if accrual is delayed until the time a petitioner has knowledge of the injury, then the petitioner is allowed the full statutory period after he or she acquires the knowledge to file suit. On the other hand, if accrual starts upon the first symptom or manifestation of the onset and the petitioner's lack of knowledge of the injury results in equitable tolling that lasts beyond the expiration of the time period set forth in the statute of limitations, then the petitioner, upon acquiring the requisite knowledge, is required to proceed with due diligence to file a petition. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991).

Thus, for the reasons stated above, the statutory language of the Vaccine Act supports the conclusion that Congress did not intend to negate the presumption that equitable tolling applies to the limitations period set forth in Section 16(a)(2).

VIII.

Perhaps the most compelling reason to conclude that Congress intended equitable tolling to apply to Section 16(a)(2) is that equitable tolling is fully consistent with the goals Congress intended the Vaccine Act to achieve. Prior to enactment of the Vaccine Act, individuals sought compensation for vaccine-related injuries primarily through civil tort damage actions against vaccine manufacturers and administrators. Congress became concerned, however, that these civil actions were deterring the manufacture, development, and use of vaccines and, in addition, that the civil tort system did not efficiently and effectively address the needs of injured vaccine recipients. In an effort to address these concerns, Congress enacted the Vaccine Act as a potential alternative system for seeking compensation for vaccine-related injuries. Congress intended the Vaccine Act not only to diminish the number of civil damage actions but also to create a "compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty

and generosity." H.R. Rep. No. 908, 99th Cong., 2d Sess. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6287, 6344.[3]

The Vaccine Act diminishes civil damage litigation by offering an alternative to seeking compensation for vaccine-related injuries through civil tort actions and by ordinarily precluding an injured person from filing a civil tort action before first pursuing compensation under the Vaccine Act. Sections 11(a)(2)(A) and 21 preclude persons from filing civil damage actions seeking in excess of $1,000 for injuries resulting from vaccines administered after the effective date of the Vaccine Act, except in those situations where this court fails to act on a petition within the time specified in Section 12 or the individual secures a judgment under the Vaccine Act and determines not to accept that judgment. With respect

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[3] As to the effect civil damage actions were having on vaccine manufacture, development, and use, the House Report accompanying the Vaccine Act bill states:

> At least in part as a result of this increase in litigation, the prices of vaccines have jumped enormously. The number of childhood vaccine manufacturers has declined significantly. In certain areas, the level of immunization against some preventable diseases has decreased while the incidence of those diseases has increased.

H.R. Rep. No. 908 at 4, *reprinted in* 1986 U.S.C.C.A.N. at 6345. As to the deficiencies in the civil tort system for securing compensation for vaccine-related injuries, the House Report continues:

> But for the relatively few who are injured by vaccines—through no fault of their own—the opportunities for redress and restitution are limited, time-consuming, expensive, and often unanswered. Currently, vaccine-injured persons can seek recovery for their damages only through the civil tort system or through a settlement arrangement with the vaccine manufacturer. Over time, neither approach has proven satisfactory. Lawsuits and settlement negotiations can take months and even years to complete. Transaction costs—including attorneys' fees and court payments—are high. And in the end, no recovery may be available. Yet futures have been destroyed and mounting expenses must be met.

Id. at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6347.

to Congress' intent to offer vaccine-injured persons a simpler, more efficient, and generous compensation system, the Vaccine Act, creates a presumption of entitlement to compensation based on the showing of a limited set of facts under the Vaccine Injury Table. This presumption not only can lower legal costs but also potentially can make compensation available in those situations where an injured party may not be able to make a showing of causation necessary to prevail in a civil tort action.

Interpreting Section 16(a)(2) as allowing the expiration of the statute of limitations before a petitioner reasonably would have known of the vaccine-related injury would undermine these interrelated goals of diminishing civil tort actions and creating an efficient and generous alternative compensation system for vaccine-related injuries. Statutes of limitations generally do not expire for civil tort damage actions before an injured person discovers his or her injury. *Cada*, 920 F.2d at 450. Hence, if an individual who discovers a vaccine-related injury after a significant delay would be barred from proceeding under the Vaccine Act but not from proceeding with a civil tort damage action, the result would be not only to render the new, quick, easy, and generous compensation scheme unavailable to certain persons injured by vaccines, but also to encourage the resort to civil tort actions which is completely inconsistent with Congress' intent of creating an alternative compensation scheme to discourage civil tort actions.

An argument can be made that the appropriate interpretation of Section 16(a)(2) is that an individual also would be barred from bringing a civil tort action if he or she failed to file a timely petition under Section 16(a)(2).[4] Even this

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[4] Section 11(a)(2)(A) precludes civil actions for damages over $1,000 "unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under [the Vaccine Act]." To the extent a petition filed outside the 36-month statutory period is not "in accordance"

interpretation, however, points in favor of the availability of equitable tolling. Assuming the filing of a petition beyond the statutory time period set forth in Section 16(a)(2) has the effect of precluding the filing of a civil tort action and assuming also that equitable tolling is available in civil tort actions but not under Section 16(a)(2), the net effect of the Vaccine Act would be to bar an injured person from bringing a civil tort action that the person could have brought prior to the adoption of the Vaccine Act. But precluding the only remedy available to an injured person who reasonably did not know of his or her injury until more than 36 months after the first symptom or manifestation of the onset would hardly seem consistent with Congress' effort to create a "generous" compensation scheme. Moreover, the legislative history of the Vaccine Act supports the contrary conclusion that Congress intended to create an *alternative* compensation scheme and not to eliminate the option of an injured person to bring a civil tort action. The pertinent House Report, *inter alia*, indicates that Congress intended an individual who elects to reject a judgment under the Vaccine Act to have the option of fling "a civil action for damages relating to a vaccine injury *just as he or she may have done prior to the enactment of the legislation*." H.R. Rep. No. 908 at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6344 (emphasis added).

Hence, for the above reasons, the wording of the Vaccine Act and its legislative history support an interpretation of Section 16(a)(2) that would allow the court, when equity so demands, to toll the running of the statute of limitations where a petitioner did not know, and reasonably could not have known, that the vaccine recipient had sufferers an injury compensable under the Vaccine Act.[5]

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with Section 16, that untimely petition would bar an otherwise timely civil damage suit.

[5] The unpublished *Melendez* decision upon which the special master relied does not demand a different result. Consistent with this court's

Conclusion

For the reasons set forth above, the court concludes that Congress intended the 36-month statutory period in Section 16(a)(2) to commence to run upon the first symptom or manifestation of the onset of the injury and that Congress did not intend to negate the presumption that equitable tolling applies to this limitations period. Because the special master did not interpret Section 16(a)(2) as subject to equitable tolling and hence did not make the subsidiary factual findings necessary to determine whether equitable tolling should apply and, if so, whether the resulting toll is sufficient to render the instant petition timely filed, this court will remand this action to the special master for consideration of these issues. On or before December 5, 1996, the special master shall file a response to this opinion.

IT IS SO ORDERED.

/s/ Roger B. Andewelt
ROGER B. ANDEWELT
Judge

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approach, the *Melendez* court concluded that accrual occurred notwithstanding an alleged lack of knowledge by the petitioner that her daughter had suffered an injury compensable under the Vaccine Act. The court, however, did not conclude that such lack of knowledge was irrelevant to equitable tolling. To the contrary, the court accepted the special master's finding that the facts did not support equitable tolling because the petitioner was on notice of the injury within the limitations period.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-5144

JOSEPH OSLER BRICE and LAURAJEAN COUNCILL BRICE,
on behalf of their son, JOSEPH TILGHMAN BRICE,
Petitioners-Appellants,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 7, 2001.

Circuit Judge NEWMAN would rehear the appeal.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: May 31, 2001

cc: Peter H. Meyers
Mark W. Rogers

BRICE V HHS, 99-5144
(CFC-95-VV-0835)